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Jurisdiction Over a Corporation Based on the Contacts of a Related Corporation: Time for a Rule of Attribution

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> *[A] corporation as such never transacts business and is never found anywhere, but does "transact business" and is "found" somewhere by attribution to the corporation of what human beings do for it.*[1]

I. Introduction

The United States Supreme Court in *International Shoe Co. v. Washington*,[2] recognizing the fiction of "presence" as it related to corporations, formulated a more realistic constitutional basis for jurisdiction—"minimum contacts."[3] The Court stated the new theory of jurisdiction as follows:

> [D]ue process requires only that in order to subject a defendant to a judgment *in personam*, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."[4]

The historical justification for a court's exercise of personal jurisdiction over a defendant was the defendant's presence within the territory of the state in which the court was located.[5] This idea of "presence" as a basis of jurisdiction, however, did not work well conceptually with corporate defendants.[6] Unlike a natural person whose corporal presence can theoretically be determined at any point in time, the corporate person has no such clearly definable presence. The corporation, as an entity separate from its employees and share-

1. United States v. Scophony Corp., 333 U.S. 795, 820 (1948) (Frankfurter, J., concurring).

2. 326 U.S. 310 (1945).

3. *Id.* at 316.

4. *Id.* Although *International Shoe* dealt with a corporate defendant, the Supreme Court spoke in terms of "defendants" not "corporations" in articulating the new minimum contacts test. Consequently, the minimum contacts test has been applied equally to both corporate and individual defendants.

5. *See* Pennoyer v. Neff, 95 U.S. 714 (1877), in which the Supreme Court, speaking through Mr. Justice Field, said: "Every state possesses exclusive jurisdiction and sovereignty over persons and property within its territory . . . and no state can exercise direct jurisdiction and authority over persons or property without its territory." *Id.* at 722.

6. *See International Shoe*, 326 U.S. at 316-17.

holders, is a fiction, "although a fiction intended to be acted upon as though it were a fact."[7] Consequently, a corporation can only act, and thereby establish contacts, through human beings who are authorized to transact business on behalf of the corporation.[8] The term "presence" as it related to corporations merely symbolized those activities and contacts of the corporation's human agents.[9]

Although the Supreme Court in *International Shoe* chose to use the term "agent" rather than "employee,"[10] the Court did not directly address the issue of *whose* contacts may be attributed to a corporate defendant in order to establish the necessary minimum contacts. This issue arises when jurisdiction over an out-of-state[11] corporation is sought based on activities performed by a related[12] in-state[13] corporation. This fact situation can occur in one of three ways. First, the plaintiff can seek to establish personal jurisdiction over an out-of-state parent corporation based on the contacts of its in-state subsidiary.[14] Second, the plaintiff can seek to establish personal jurisdiction over an out-of-state subsidiary corporation based on the contacts of its in-state parent.[15] Third, the plaintiff can seek to establish personal jurisdiction over an out-of-state subsidiary corporation based on the contacts of its in-state sister-subsidiary.[16] When faced with this issue, courts have often resorted to theories other than that of "minimum contacts," such as the alter ego[17] and

7. *Id.* at 316 (citing Klein v. Board of Supervisors, 282 U.S. 19, 24 (1930)).

8. *Id.*

9. *Id.* at 316-17.

10. *Id.* at 317. From the opinion, it appears that the Court did not use the term "agent" in a legal sense. Instead, the Court used "agent" simply to mean one who acts for and on behalf of another by authority from him. The term "agent" is much broader in scope than the term "employee," which the Court could have used based upon the facts of the case.

11. As used in this Comment, "out-of-state" refers to corporations that are not incorporated in the forum state, have no principal place of business in the forum state, and are not registered to do business in the forum state. The term "in-state" refers to corporations that are incorporated in the forum state, are admittedly doing business in the forum state, or are registered to do business in the forum state.

12. As used in this Comment, "related" refers to corporations that are connected through the ownership of stock by a parent corporation.

13. *See supra* note 11.

14. As used in this Comment, "subsidiary" is a corporation in which another corporation, a parent, owns at least a majority of the shares and thus has control. For the purpose of this Comment, there is no need to distinguish between wholly-owned and non-wholly-owned subsidiaries.

See, e.g., United States v. Toyota Motor Corp., 561 F. Supp. 354 (C.D. Cal. 1983); Graco, Inc. v. Kremlin, Inc., 558 F. Supp. 188 (N.D. Ill. 1982).

15. *See, e.g.*, Jayne v. Royal Jordanian Airlines Corp., 502 F. Supp. 848 (S.D.N.Y. 1980); Rea v. An-Son Corp., 79 F.R.D. 25 (W.D. Okla. 1978).

16. *See, e.g.*, Gavigan v. Walt Disney World, Inc., 646 F. Supp. 786 (E.D. Pa. 1986); Arrow Trading Co., Inc. v. Sanyei Corp. (Hong Kong), Ltd., 576 F. Supp. 67 (S.D.N.Y. 1983).

17. *See infra* notes 64-78 and accompanying text.

agency[18] theories, to determine whether they should exercise jurisdiction. These other theories stem from substantive rules of liability, rather than procedural rules of jurisdiction. As a consequence, they focus the court's attention on the details of the corporate family relationship, such as the general commingling of affairs and operations, rather than on the nature and quality of the contacts made by the in-state corporation on behalf of the related out-of-state corporation.

As a general proposition, this Comment suggests that courts should *not* limit the jurisdictional exposure of related out-of-state corporations by, in essence, employing a higher jurisdictional standard based on theories of liability. Instead, the courts should analyze this jurisdictional situation involving related corporations by using the same "minimum contacts" theory employed in other personal jurisdiction cases.[19] There is, however, one exception to this proposition in which a rational reason exists for the courts to apply a different analysis.[20] This exception occurs when jurisdiction over an out-of-state parent corporation is sought based on the activities of its in-state subsidiary in an attempt to hold the parent liable for an act or omission of the subsidiary.[21] Jurisdiction in this instance is sought in order to pierce the subsidiary's corporate veil and expose the parent shareholder to unlimited liability.[22] Because the parent's substantive right of limited liability could be infringed through the exercise of jurisdiction, courts should apply an alter-ego or agency theory[23] to the jurisdictional issue to show that, in this particular situation, the parent has lost its right to limited liability because of an abusive use of the corporate form.[24] Because of the rational basis for this excep-

18. *See infra* notes 79-108 and accompanying text.

19. *See supra* note 4. To assert personal jurisdiction over an out-of-state defendant, the Supreme Court in *International Shoe* held that the due process clause of the fourteenth amendment requires a showing of certain minimum contacts with the forum state "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " 326 U.S. at 316. The due process clause of the fourteenth amendment provides protection to both natural persons and corporate persons. U.S. CONST. amend. XIV, § 1.

20. *See generally* L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-2 at 994-95 (1978).

21. *See, e.g.*, Wells Fargo & Co. v. Wells Fargo Express Co., 556 F.2d 406 (9th Cir. 1977); Quarles v. Fuqua Industries, Inc., 504 F.2d 1358 (10th Cir. 1974); Indian Coffee Corp. v. Proctor & Gamble Co., 482 F. Supp. 1098 (W.D. Pa. 1980); Beary v. Norton-Simon, Inc., 479 F. Supp. 812 (W.D. Pa. 1979); Crow Tribe of Indians v. Mohasco Industries, Inc., 406 F. Supp. 738 (D. Mont. 1975).

22. *See* H. HENN & J. ALEXANDER, LAWS OF CORPORATIONS § 146 (3d ed. 1983); N. LATTIN, THE LAW OF CORPORATIONS § 14 (2d ed. 1971).

23. *See infra* notes 64-108 and accompanying text.

24. *See* N. LATTIN, *supra* note 22, § 14, at 73 ("[W]here 'the corporate devise has been used to defraud creditors, to evade existing obligations, to circumvent a statute, to achieve a monopoly, or to protect Knavery or crime,' courts have held that the corporation may not be used for such ends." (quoting Professor Warner Fuller)).

tion, this Comment limits its focus to cases in which the out-of-state corporation is sued for its own actions or omissions.

When a court decides whether to exercise its adjudicatory authority over an out-of-state corporate defendant, it normally applies a two-step process.[25] The court first looks to see if an applicable rule of competence, such as the state's long-arm statute, authorizes the court to exercise jurisdiction.[26] The court then considers whether the application of that rule comports with the constitutional requirements of the due process clause.[27] For the purposes of this Comment, no distinction will be made between these two steps. The method of analysis under both steps is essentially the same and varies only by degree depending on whether jurisdiction under the appropriate state statute is accorded to the limits allowed under due process.[28]

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25. Note, *Developments in the Law: State-Court Jurisdiction*, 73 HARV. L. REV. 909, 998 (1960).

26. Federal courts sitting in diversity determine whether a defendant is amenable to service of process by referring to state law. Arrowsmith v. United Press Int'l, 320 F.2d 219 (2d Cir. 1963).

See, e.g., Haisten v. Grass Valley Medical Reimbursement Fund, Ltd., 784 F.2d 1392, 1396 (9th Cir. 1986) ("[P]laintiff must show, first, that the state statute of the forum confers personal jurisdiction over the non-resident defendant . . . ."); Wallace v. Herron, 778 F.2d 391, 393 (7th Cir. 1985) ("We look first to Indiana's 'long-arm' statute . . . ."), *cert. denied*, 106 S. Ct. 1642 (1986); Stuart v. Spademan, 772 F.2d 1185, 1189 (5th Cir. 1985) ("The first step of the [personal jurisdiction] inquiry is solely a matter of determining the reach of the forum state's long-arm statute."); Afram Export Corp. v. Metallurgiki Halyps, 772 F.2d 1358, 1362 (7th Cir. 1985) ("The first question we take up is whether Wisconsin's long-arm statute . . . can be used . . . to haul Metallurgiki before a federal court in Wisconsin."); Bond Leather Co. v. Q.T. Shoe Mfg., 764 F.2d 928, 931 (1st Cir. 1985) ("[T]wo questions must be answered affirmatively in order for a Massachusetts court properly to exercise *in personam* jurisdiction over a nonresident defendant: '(1) is the assertion of jurisdiction authorized by the [Massachusetts long-arm] statute, and (2) if authorized, is the exercise of jurisdiction under State law consistent with basic due process requirements mandated by the United States Constitution?' " (quoting Good Hope Indus. v. Ryder Scott Co., 378 Mass. 1, 5-6, 389 N.E.2d 76, 79 (1979)) (second brackets in original)).

But see Comment, *Giving the Boot to the Long-Arm: Analysis of Post-International Shoe Supreme Court Personal Jurisdiction Decisions, Emphasizing Unrealized Implications of the "Minimum Contacts" Test*, 75 KY. L.J. 885, 910-22 (1987) ("[T]his Comment argues that a [state] long-arm statute is not constitutionally mandated and that the search for an applicable long-arm statute obscures inquiry into the real bases for jurisdiction." *Id.* at 910).

27. Two such clauses are found in the United States Constitution: one in the fifth amendment that pertains to the federal government, and the other in the fourteenth amendment that protects persons from state actions.

28. A state may choose to exercise its jurisdiction to the full extent of its powers under the United States Constitution. Perkins v. Benquet Consolidated Mining Co., 342 U.S. 437 (1952). Some long-arm statutes are mere expressions that the state will reach to the constitutional maximum. *See, e.g.*, CAL. CIV. PROC. CODE § 410.10 (West 1973 and Supp. 1988); R.I. GEN. LAWS § 9-5-33 (1985). Such "constitutional maximum" statutes are hollow shells or mere forms because the "content" of the statute offers no direct guidance regarding the types of contacts relevant for jurisdictional purposes.

See Comment, *supra* note 26, at 923-32 (This article argues that a state *must* exercise its adjudicatory authority to the extent allowed under the due process clause of the fourteenth amendment. Additionally, the article argues that short-arm statutes, which prospectively cut off the ability to adjudicate certain causes of action, are unconstitutional.).

The due process clause of the fourteenth amendment requires that if a defendant is not present within the territory of the state asserting jurisdiction, the state may only sue the defendant if two elements are established. First, the defendant must have minimum contacts[29] with the state resulting from an affirmative act by which it "purposefully availed" itself of the privilege of conducting activities there and invoked the benefits and protections of the forum state's laws.[30] Second, an assertion of jurisdiction must not offend "traditional notions of fair play and substantial justice."[31] Together, these two elements constitute the "minimum contacts" theory of jurisdiction as set forth in *International Shoe*. Both elements must be met for the state to constitutionally assert jurisdiction over an out-of-state defendant. Jurisdiction can be denied on the basis of the second element without making a prior determination of the first.[32] This Comment, however, deals only with the first of these two elements—minimum contacts.

The focus of this Comment is on the *method of analysis* applied by courts when addressing the issue of whether an out-of-state corporation is doing business of a sufficient nature and quality through its related in-state corporation in order to establish minimum contacts with the forum state. To place this issue and its related inquiries into proper perspective, part II of this Comment presents a brief

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29. *International Shoe*, 326 U.S. at 316.

30. Hanson v. Denckla, 357 U.S. 235, 253 (1958). In *Hanson*, the Supreme Court clarified and qualified the "minimum contacts" test established in *International Shoe*. The heart of the *Hanson* opinion is found in the following passage:

> The unilateral activity of those who claim some relationship with a nonresident defendant cannot satisfy the requirement of contact with the forum State. The application of that rule will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.

Id.

31. *International Shoe*, 326 U.S. at 316. "Once it has been decided that a defendant purposefully established minimum contacts within the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice.' " Burger King Corp. v. Rudzewicz, 105 S. Ct. 2174, 2184 (1985). For a list of the relevant factors, see footnote 142.

32. Asahi Metal Industry Co. v. Superior Court of California, 107 S. Ct. 1026 (1987), exemplifies that both elements of the "minimum contacts" test must be met for a state to constitutionally exercise jurisdiction over an out-of-state defendant. In *Asahi*, the Supreme Court Justices were split on the issue of whether the out-of-state foreign corporation had minimum contacts with the forum state. Eight of the Justices, however, agreed that, because of the specific facts of the case, it would have been unreasonable and unfair to exercise jurisdiction over the corporate defendant. Consequently, even if the Justices had agreed on the minimum contacts element, the assertion of jurisdiction would not have complied with the second element because it would have offended traditional notions of fair play and substantial justice. Without compliance with both elements, jurisdiction over the out-of-state corporation could not pass constitutional due process muster.

historical background of the issue. In particular, *Cannon Manufacturing Co. v. Cudahy Packing Co.*[33] is discussed in light of the great impact that the case has had on the development of the law in this area. Next, part III discusses the treatment of the issue in cases and analyzes the various theories that courts have applied to the issue.

Finally, part IV suggests that courts should analyze the jurisdictional issue involving related corporations by applying "a jurisdictional rule of attribution"[34] in conjunction with the "minimum contacts" test. The jurisdictional rule of attribution, as introduced and proposed in this Comment, should be applied to determine whether the contacts of the related in-state corporation could be attributed to its related out-of-state corporation. This rule of attribution focuses on whether the out-of-state corporation intended to transact business through its related in-state corporation, rather than on the means through which the business was transacted. If a court determines that the in-state contacts could be attributed to the out-of-state corporation, the court should then apply the "minimum contacts" theory to determine whether the attributed contacts were of a sufficient nature and quality to comply with the first element of the due process analysis—establishing minimum contacts.

II. Historical Background

A. Constitutional Doctrines Prior to International Shoe

Historically, the law regarded corporations as creatures of the state that created them, having no legal existence outside the state of incorporation and, therefore, not subject to suit elsewhere.[35] When, in an expanding economy, it became clear that corporations were, in fact, carrying on their activities in many states, the courts sought theoretical justification for subjecting out-of-state corporations to the jurisdiction of the states in which they operated.[36] The first approach to become widely adopted was the consent theory, both express and

33. 267 U.S. 333 (1925).

34. *See infra* notes 150-69 and accompanying text.

35. Note, *supra* note 25, at 919.

36. The history of the theoretical justifications for rendering in personam judgments against foreign corporations is long and complex. The prevailing theories were consent and presence. For cases applying the consent theory, see St. Louis S.W. Ry. v. Alexander, 227 U.S. 218 (1913); St. Clair v. Cox, 106 U.S. 350 (1882); Lafayette Ins. Co. v. French, 59 U.S. (18 How.) 404 (1855). For cases applying the presence theory, see Bank of America v. Whitney Bank, 261 U.S. 171 (1923); International Harvester Co. v. Kentucky, 234 U.S. 579 (1914). *See also* Note, *supra* note 25, at 919-21; Foster, *Personal Jurisdiction Based on Local Causes of Action*, 1956 WIS. L. REV. 522, 527-35 (1956).

implied.[37] The courts that applied this theory argued that, because a corporation has no inherent right to do business in another state,[38] a state could make "consent to be sued" a condition of the out-of-state corporation's transaction of business in the forum. A second approach that was adopted to justify the assertion of personal jurisdiction over an out-of-state corporation was the presence theory.[39] The courts applying this theory reasoned that a corporation doing business in the forum state was also present in that state for jurisdictional purposes. Regardless of whether a court chose to justify jurisdiction under a consent theory or a presence theory, the test was whether the corporation was "doing business" in the forum state at the determinative time.[40]

B. Cannon Manufacturing Co. v. Cudahy Packing Co.

It was against this background that the United States Supreme Court decided *Cannon Manufacturing Co. v. Cudahy Packing Co.*[41] in 1925. In the *Cannon* case, a North Carolina corporation, Cannon Manufacturing Company, attempted to sue a Maine corporation, Cudahy Packing Company, in North Carolina for breach of contract.[42] Cannon initiated the action by serving process on a wholly-owned subsidiary of the defendant that was doing business in North Carolina. The defendant moved for dismissal of the action for lack of personal jurisdiction. The plaintiff contended that the defendant parent corporation was doing business through its in-state subsidiary and, therefore, was present in the forum state.

The Court in *Cannon* recognized that the defendant's wholly-owned subsidiary was present in North Carolina, that it had been established as an "instrumentality employed to market [its parent's] products within the state,"[43] and that it was completely controlled both commercially and financially by its parent. After acknowledging these facts, the Court drew two conclusions out of which have stemmed the agency and alter-ego theories which courts apply when analyzing this jurisdictional issue.[44] First, the Court found that, al-

37. *See supra* note 36.

38. A corporation is not a citizen under the privileges-and-immunities clause of article IV of the United States Constitution. U.S. CONST. art. IV, § 2. *See* Paul v. Virginia, 75 U.S. (8 Wall.) 168 (1868). *See also* H. HENN & J. ALEXANDER, *supra* note 22, at § 89.

39. *See supra* note 36.

40. Note, *supra* note 25, at 922; Foster, *supra* note 36, at 535.

41. 267 U.S. 333 (1925).

42. *Id.* at 333.

43. *Id.* at 334.

44. *See infra* notes 64-108 and accompanying text.

though the subsidiary was an "instrumentality," it was not an "agent" of the defendant parent corporation.[45] Second, the Court concluded that the carefully maintained corporate separation between the parent and the subsidiary, "though perhaps merely formal, was real"[46] and, therefore, would not be ignored in determining the existence of jurisdiction.

The *Cannon* case has been widely cited as establishing the rule that "mere ownership" of a subsidiary will not subject the parent to the jurisdiction of the state in which the subsidiary is doing business as long as formal corporate separateness between the parent and subsidiary is maintained.[47] The current validity of *Cannon*, however, is extremely questionable for two reasons. First, the *Cannon* case was decided prior to *Erie Railroad v. Tompkins*[48] and, therefore, was not based on constitutional due process grounds.[49] Thus, the Supreme Court in *Cannon* was interpreting what constituted "doing business" under general federal common law.[50] Second, the *Cannon* case was decided prior to *International Shoe Co. v. Washington*[51] and, therefore, was constitutionally restricted by the old territorial due process notion that a state could exercise jurisdiction only over those persons present in the forum.[52] Analyzed in this context, the holding of *Cannon* is understandable because the only way the plaintiff could have shown that the out-of-state corporation was present in the forum was by establishing that its in-state subsidiary was really its alter-ego. In light of these reasons, *Cannon* cannot presently be regarded as mandatory precedent in any state.

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45. *Cannon*, 267 U.S. at 335. The Court failed to state which elements were necessary to become an "agent" rather than merely an "instrumentality." It appears, however, that the Court used "agent" in the legal sense according to the formal principles of agency law. Compare this application of "agent" with the way the Court applied this term in *International Shoe*. *See supra* note 10 and accompanying text.

46. *Cannon*, 267 U.S. at 335.

47. *See* Wellborn, *Subsidiary Corporations in New York: When Is Mere Ownership Enough to Establish Jurisdiction Over the Parent?*, 22 BUFFALO L. REV. 681, 684 (1973).

48. 304 U.S. 64 (1938). Prior to *Erie Railroad*, a federal court sitting in diversity applied the statutory law of the state in which it was sitting but was free to fashion its own version of the common law. Consequently, a large body of "federal common law" developed that the federal courts applied regardless of conflict with a state's common law. After *Erie Railroad*, a federal court sitting in diversity applied the same substantive law, both statutory and common law, that a state court in the state in which it was located would apply. *See* M. GREEN, BASIC CIVIL PROCEDURE, 6-8 (2d ed. 1979).

49. *Cannon*, 267 U.S. at 336 ("No question of the constitutional powers of the state, or of the federal government, is directly presented.").

50. *See* Wellborn, *supra* note 47, at 684; Cardozo, *A New Footnote in Erie v. Tompkins: "Cannon Is Overruled"*, 36 N.C.L. REV. 181 (1958).

51. 326 U.S. 310 (1945). *See* Wellborn, *supra* note 47, at 684; Comment, *Jurisdiction Over Parent Corporations*, 51 CALIF. L. REV. 574 (1963).

52. *See* Pennoyer v. Neff, 95 U.S. 714 (1877). *See also supra* note 5.

III. Analysis of the Various Jurisdictional Theories

Courts have varied greatly in applying the rule established in *Cannon Manufacturing Co. v. Cudahy Packing Co.*[53] that mere ownership of a subsidiary will not subject the parent to the jurisdiction of the state in which the subsidiary is doing business as long as formal corporate separateness between the parent and subsidiary is maintained.[54] Some courts have continued to strictly apply the *Cannon* rule.[55] Other courts have developed exceptions to the *Cannon* rule.[56] Still others have applied the *Cannon* rule in conjunction with a "minimum contacts" analysis.[57] Finally, several courts have decided that the *Cannon* rule has been superseded.[58]

A. Strict Application of the Cannon Rule: Insufficient Intercorporate Separateness Theory

Some courts continue to rely on *Cannon* as the controlling authority in this area of the law even though it is not mandatory precedent.[59] In *Rollins v. Proctor & Schwartz*,[60] for example, the plaintiff was severely injured when he was pulled into textile machinery that had been manufactured by an out-of-state subsidiary corporation. The plaintiff, seeking to obtain jurisdiction over the out-of-state subsidiary, contended that the in-state parent so dominated and controlled its subsidiary that each was the alter-ego of the other. The court, recognizing a distinction between piercing the corporate veil for substantive purposes and piercing the corporate veil for jurisdictional purposes, stated that the omnipresence of *Cannon* dictated that the jurisdictional amenability issue turned on a disregard of cor-

53. 267 U.S. 333 (1925).

54. *See supra* note 47 and accompanying text.

55. *See, e.g.*, Rollins v. Proctor & Schwartz, 478 F. Supp. 1137, 1144 (D.S.C. 1979) ("[*Cannon's*] comments on intercorporate jurisdictional responsibility are still relevant today."); Frito-Lay Inc. v. Proctor & Gamble Co., 364 F. Supp. 243, 247 (N.D. Tex. 1973) ("[T]his court has no reason to believe that the rule of *Cannon* is not still controlling where applicable.").

56. *See, e.g.*, Saraceno v. S.C. Johnson and Son, Inc., 83 F.R.D. 65 (S.D.N.Y. 1979) (agency and mere department exceptions applied); Oostdyk v. British Airtours Ltd., 424 F. Supp. 807 (S.D.N.Y. 1976) (agency and mere department exceptions applied).

57. *See, e.g.*, Graco, Inc. v. Kremlin, Inc., 558 F. Supp. 188 (N.D. Ill. 1982); Pasquale v. Genovese, 136 Vt. 417, 392 A.2d 395 (1978).

58. *See, e.g.*, Allen Organ Co. v. Kawai Musical Instruments Manufacturing Co., 593 F. Supp. 107, 110 (E.D. Pa. 1984) ("The result of the change in standard is to render irrelevant to our determination of personal jurisdiction any consideration of the alter ego principles of corporate law discussed in *Cannon*."); Energy Reserves Group, Inc. v. Superior Oil Co., 460 F. Supp. 483, 495-511 (D.C. Kan. 1978) (case provides a "treatise" on the demise of *Cannon*).

59. *See supra* notes 48-52 and accompanying text.

60. 478 F. Supp. 1137 (D.S.C. 1979).

porate formalities.[61] After an analysis of the interrelationship between the parent and subsidiary, the court concluded that separate corporate formalities had not been maintained because the subsidiary had no functioning board of directors.[62] Holding the out-of-state subsidiary subject to suit in the forum, the court stated that "if observation of all corporate formalities prevents subjecting the parent to jurisdiction via the activities of the subsidiary — (or vice versa) — then disregard of corporate formalities will void the protection."[63]

B. Exceptions to the Cannon Rule: Alter-Ego and Agency Theories

Other courts not so willing to exalt form over substance developed exceptions to the *Cannon* rule as a method of avoiding its limited and strict application. These exceptions are actually conceptual theories that justify the exercise of jurisdiction in certain situations. These theories can be roughly divided into two broad categories—alter-ego and agency. The alter-ego analysis disregards the formal corporate separateness as purely fictional and declares the subsidiary a mere department or instrumentality of the parent corporation.[64] The agency analysis, on the other hand, does not disregard the corporate separateness but simply declares the subsidiary to be the agent of the parent corporation or vice versa.[65]

With the *International Shoe Co. v. Washington*[66] decision in 1945, courts no longer needed to apply these exceptions to the *Cannon* rule. Courts could have avoided *Cannon* altogether by simply employing the "minimum contacts" analysis set forth in *International Shoe*. Unfortunately, however, most courts have not realized this and have continued to analyze the parent-subsidiary situation as one governed by its own unique set of jurisdictional rules stemming from the *Cannon* case.

1. Alter-Ego Theory.—The alter-ego theory, also known as the mere department theory, stems from the judicial doctrine of

61. *Id.* at 1143 and 1143 n.13.

62. *Id.* at 1147. The court conceded that, even if the subsidiary had had its own board of directors, the degree of control exercised by the parent would most likely have remained the same.

63. *Id.* at 1146. It is interesting to note that by applying the *Cannon* rule, a court can assert jurisdiction over an out-of-state corporation without ever mentioning the words "minimum contacts."

64. H. HENN & J. ALEXANDER, *supra* note 22, at § 148.

65. *Id.*

66. 326 U.S. 310 (1945).

piercing the corporate veil. This doctrine is employed by courts when the corporate form has been used for a purpose not permitted by the legislative privilege of the corporate device.[67] In such a situation, a court will disregard technically correct corporateness, declare the subsidiary the alter-ego of its parent corporation, and impose unlimited liability on the parent shareholder. Piercing the corporate veil is merely a conceptual way of saying that the privilege of doing business in the corporate form—the limited liability of the shareholders—will not be honored.[68]

Applying the doctrine of piercing the corporate veil to a personal jurisdiction issue is not only unrealistic but also conceptually inapplicable. The separate corporate entities are never actually disregarded. The parent and its subsidiary continue to exist as separate and distinct corporations while the personal jurisdiction issue is being decided as well as after its disposition. In addition, corporations have no special substantive privilege of limited amenability.[69] Accordingly, there is no privilege to disregard or veil to pierce as there is with the liability issue.

The issue of whether a corporation is doing business through a subsidiary "may be treated as an entirely different question" from that of loss of limited liability.[70] Recognizing this, some courts have attempted to lower the standard of proof when applying the alter-ego doctrine for jurisdictional purposes and have developed what one commentator called "quasi-substantive" rules of law.[71] Even with a lower standard, however, the alter-ego theory necessarily focuses on

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67. H. HENN & J. ALEXANDER, *supra* note 22, at § 146; N. LATTIN, *supra* note 22, at § 14.

68. *See* H. HENN & J. ALEXANDER, *supra* note 22, at § 146, n.2 ("[C]ourts simply will not let interposition of corporate entity or action prevent a judgment otherwise required. Corporate presence and action no more than those of an individual will bar a remedy demanded by law in application to facts. Hence the process is not accurately termed one of disregarding corporate entity. It is rather and only a refusal to permit its presence and action to divert the judicial course of applying law to ascertained facts. The method neither pierces any veil nor goes behind any obstruction, save for its refusal to let one fact bar the judgment which the whole sum of facts requires." (quoting *In re* Clark's Will, 204 Minn. 547, 578, 284 N.W. 876, 878 (1939))).

69. *See* Wellborn, *supra* note 47, at 686 ("The amenability of corporations to suit in other states is determined by the jurisdictional law of those states and the only limitations on it . . . are federal due process limitations.").

70. Ballantine, *Separate Entity of Parent and Subsidiary Corporations*, 14 CALIF. L. REV. 12, 14 (1925). *See also* E. LATTY, SUBSIDIARIES AND AFFILIATED CORPORATIONS: A STUDY IN STOCKHOLDERS' LIABILITY 61 (1936) (maintaining that the policies behind veil-piercing in the procedural context and veil-piercing in the substantive context are very different).

71. Brilmayer & Paisley, *Personal Jurisdiction and Substantive Legal Relations: Corporations, Conspiracies, and Agency*, 74 CALIF. L. REV. 1, 33 (1986).

the intercorporate family relationship, emphasizing factors such as control,[72] and does not focus on the quality and nature of the in-state contacts made on behalf of the out-of-state corporation.

Marantis v. Dolphin Aviation, Inc.[73] exemplifies this emphasis on control as the determinative factor in jurisdictional questions. In *Marantis*, a New York resident died in a plane crash in Florida while piloting an aircraft manufactured by Beech Aircraft Corporation. The decedent's estate instituted a products liability action in New York against Beech, arguing that Beech was doing business in New York by virtue of having seven Beech retail distributors in the forum state. The court, however, quickly pointed out that six of the distributors were independently owned franchises and that only one, East, was a wholly-owned subsidiary. Admitting that Beech dealt with East in the same manner that it dealt with the other New York franchisees, the court concluded that "what distinguishes East from the other New York franchisees is the fact that it alone is a subsidiary of Beech."[74] Directing its attention solely to the relationship between Beech and East and disregarding Beech's relationship with the other six in-state distributors, the court stated that, in order to find a parent doing business through its subsidiary, the parent's "control over the subsidiary's activities . . . must be so complete that the subsidiary is, in fact, merely a department of the parent."[75] The court decided that the relationship between Beech and East fell short of the "corporate intimacy" required to conclude that the subsidiary was a mere department of its parent.

Rea v. An-Son Corp.[76] illustrates another variation of this jurisdictional alter-ego theory. In *Rea*, the plaintiff was injured while working aboard a drilling tender vessel in Venezuela and sued the Venezuela oil drilling company for negligence. The plaintiff initiated suit in Oklahoma based on the presence of the Venezuela company's parent and grandparent corporations. In order to assert jurisdiction over the Venezuela subsidiary, the court stated that it must find the subsidiary to be the alter-ego of either its parent or grandparent cor-

72. This factor of control was regarded as inconsequential in *Cannon*. 267 U.S. at 335. Hence, the alter-ego analysis with its emphasis on control is directly contrary to the *Cannon* decision.

73. 453 F. Supp. 803 (S.D.N.Y. 1978).

74. *Id.* at 805.

75. *Id.* (quoting Delagi v. Volkswagenwerk AG, 29 N.Y.2d 426, 432, 278 N.E.2d 895, 897, 328 N.Y.S.2d 653, 657 (1972)). In addition to disregarding Beech's contact with the six franchised sales outlets, the court did not consider in its jurisdictional analysis the direct contacts that Beech had with the forum state, such as business trips by Beech employees, a New York bank account, and a New York transfer agent. *Id.* at 804 n.1.

76. 79 F.R.D. 25 (W.D. Okla. 1978).

poration. The court, applying the same reasoning that it applied to piercing the corporate veil for liability purposes, employed eleven factors in making its jurisdictional determination.[77] After analyzing these factors, the court held that the related corporations had exercised "sufficient control" over their subsidiary to enable the court to disregard the separate identities of each. The court made this finding even though the record was incomplete with respect to the degree of control exerted over the out-of-state subsidiary and concluded that "the legal test of liability is different and more stringent than the test relating to the amenability of process and forum."[78]

2. Agency Theory.—The agency theory stems from the substantive law of agency.[79] Agency law primarily establishes the rights and liabilities between an agent, a principal, and third parties. An agency is a consensual fiduciary relationship between the agent who agrees to act for and under the direction or control of the principal.[80] The degree of control that the principal has over the agent determines more specifically the type of relationship involved. For example, in an employer-employee relationship, the employer controls or has the right to control the physical conduct of the employee in the performance of his duties of employment.[81] On the other hand, in an employer-independent contractor relationship, the employer has no

77. *Id.* at 29-31. The eleven factors that the court analyzed in its jurisdictional determination are:

1. Whether the parent owns all the stock of its subsidiary;
2. Whether the parent and subsidiary have common directors and officers;
3. Whether the parent finances the subsidiary;
4. Whether the parent caused the subsidiary's incorporation;
5. Whether the subsidiary has inadequate capital;
6. Whether the parent pays the salaries or expenses of its subsidiary;
7. Whether the subsidiary has business other than that with its parent or a sister subsidiary, or has assets other than that transferred to it by its parent or a sister subsidiary;
8. Whether the subsidiary's directors and officers act independently in the best interest of the subsidiary;
9. Whether the subsidiary observes the formal legal requirements necessary to maintain intercorporate separateness, such as keeping separate corporate minutes;
10. Whether the distinctions between the parent and subsidiary are disregarded or confused;
11. Whether the subsidiary has a full board of directors.

Id.

78. *Rea*, 79 F.R.D. at 31. Although the court recognized a distinction between the legal test for liability and the test for amenability of process and forum, the court failed to establish in what way the test for the jurisdictional issue differed. *See also* Rollins v. Proctor & Schwartz, 478 F. Supp. 1137, 1143 n.13 (D.S.C. 1979).

79. *See* RESTATEMENT (SECOND) OF AGENCY (1957).

80. *Id.* at § 1.

81. *Id.* at § 2.

right of control over how the independent contractor performs its work.[82]

The agency theory developed as an alternative justification for holding a parent corporation liable for the acts of its subsidiary. Courts applying this theory undoubtedly felt that it was conceptually more realistic than the alter-ego theory because in reality the separate entities are neither merged nor disregarded.[83] Every parent-subsidiary relationship is, in a broad sense, an agency relationship because of the ever-present control factor that goes along with owning all or a majority of the stock in another corporation.[84] Technically, however, the parent-subsidiary relationship falls short of being a true agency because of the parent's limited liability for the acts of its subsidiary. Therefore, in order to find that a subsidiary is an agent for its parent, the court must show something more than mere ownership of a majority of the outstanding shares of stock.[85] The court must show that the parent exercised its control by completely dominating the subsidiary corporation.[86]

The agency theory has also been applied for jurisdictional purposes.[87] From the dicta in *Cannon*, courts have inferred that jurisdiction over the parent corporation would have been extended in *Cannon* if the subsidiary had been an agent of its parent, such as a

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82. *Id.*

83. Realistically, however, there is no difference between the alter-ego and agency rationales. For the most part, the two theories are interchangeable. 1 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 43.30, at 504 (rev. ed. 1983). *See also* Andrulonis v. United States, 526 F. Supp. 183, 188 (N.D.N.Y. 1981) ("Courts posit the 'agency' and 'mere department' theories of personal jurisdiction as separate principles, but in reality no bright line separates the two.").

84. Comment, *supra* note 51, at 582. *See also* Case Comment, *Jurisdiction Over a Foreign Corporation on the Basis of Its Subsidiary's Activities in New York: Bulova Watch Co. v. K. Hattori & Co.*, 9 BROOKLYN J. INT'L L. 91, 106 (1983); Note, *Jurisdiction Over Foreign Corporations—An Analysis of Due Process*, 104 U. PA. L. REV. 381, 403 (1955); Ballantine, *supra* note 70, at 15; *but see* RESTATEMENT (SECOND) OF AGENCY § 14 (1957) ("A corporation does not become an agent of another corporation merely because a majority of its voting shares is held by the other.").

85. *See* RESTATEMENT (SECOND) OF AGENCY § 14 (1957).

86. W. FLETCHER, *supra* note 83, at § 43.30; *see also* H. HENN & J. ALEXANDER, *supra* note 22, § 146, at 344 n.2 ("Dominion may be so complete, interference so obtrusive, that by the general rules of agency the parent will be a principal and the subsidiary an agent. Where control is less than this, we are remitted to the tests of honesty and justice." (quoting Cardozo, J., in Berkey v. Third Avenue Railway, 244 N.Y. 84, 94-95, 155 N.E. 58, 61 (1926))).

87. *See, e.g.*, Andrulonis v. United States, 526 F. Supp. 183 (N.D.N.Y. 1981); Jayne v. Royal Jordanian Airlines Corp., 502 F. Supp. 848 (S.D.N.Y. 1980); Bellomo v. Pennsylvania Life Co., 488 F. Supp. 744 (S.D.N.Y. 1980); Roorda v. Volkswagenwerk, A.G., 481 F. Supp. 868 (D.S.C. 1979); Saraceno v. S.C. Johnson and Son, Inc., 83 F.R.D. 65 (S.D.N.Y. 1979); Louis Marx & Co. v. Fuji Seiko Co., 453 F. Supp. 385 (S.D.N.Y. 1978); Top Form Mills, Inc. v. Sociedad Nationale Industria Applicazioni Viscosa, 428 F. Supp. 1237 (S.D.N.Y. 1977); Oostdyk v. British Airtours Ltd., 424 F. Supp. 807 (S.D.N.Y. 1976); Baird v. Day & Zimmerman, Inc., 390 F. Supp. 883 (S.D.N.Y. 1974).

company division.[88] Because a subsidiary cannot become an agent of its parent merely because of their corporate structure,[89] courts began to look beyond the parent-subsidiary form to the actual substance of the relationship.[90] If a court found excessive parental control and interference in the affairs of the subsidiary, the court would conclude that the activities of the subsidiary could be imputed to the parent for jurisdictional purposes.

The problem with applying the agency theory to a jurisdictional issue is that, as with the alter-ego theory, the focus is on the relationship between the parent and the subsidiary and not on the quality and nature of the contacts with the forum state. Another problem with the agency theory is that courts use the term "agent" indiscriminately without ever delineating what factors need to be shown in order to establish an agency relationship.[91]

The "jurisdictional agency" theory has also been widely used in fact situations other than those involving related corporations.[92] It is interesting to note that, in these cases, the courts do not dwell on the control aspect of the relationship as they do in the parent-subsidiary cases. In fact, some of these cases do not even mention control as a factor,[93] leading to the conclusion that control is not the determina-

88. *Cannon*, 267 U.S. at 335. *See supra* note 45.

89. *See supra* note 85.

90. Comment, *supra* note 51, at 581.

91. Wellborn, *supra* note 47, at 695. *See supra* notes 10 and 45.

92. *See, e.g.*, Henry L. Doherty & Co. v. Goodman, 294 U.S. 623, 627 (1935) (out-of-state individual subject to jurisdiction based on activities of agents that were admittedly doing business in the forum state on behalf of the defendant); Gelfand v. Tanner Motor Tours, Ltd., 385 F.2d 116, 121 (2d Cir. 1967) (out-of-state corporations were subject to jurisdiction of forum state based on the activities of non-profit membership organization which booked travel tours on behalf of the corporate defendants); United States v. Montreal Trust Co., 358 F.2d 239, 244 (2d Cir.) (non-resident manager of out-of-state corporation who had personal agents in New York was subject to the forum state's jurisdiction), *cert. denied*, 384 U.S. 919 (1966); Felicia, Ltd. v. Gulf Am. Barge, Ltd., 555 F. Supp. 801, 805-06 (N.D. Ill. 1983) (Florida partnership was properly subject to jurisdiction in Illinois in action for breach of contract where contract was entered into by specific partners acting as agents of the partnership); Arcata Graphics Corp. v. Murrays Jewelers & Distrib., Inc., 384 F. Supp. 469, 472 (W.D.N.Y. 1974) (defendant Delaware corporation subject to jurisdiction in New York where merchandising association representing defendant acted in New York); City of Philadelphia v. Morton Salt Co., 298 F. Supp. 723, 725 (E.D. Pa. 1968) (out-of-state corporation that does a substantial portion of its business through a domestic distributor may be subject to the jurisdiction of the forum state); Szantay v. Beech Aircraft Corp., 237 F. Supp. 393, 398 (E.D.S.C.) (out-of-state corporate defendant subject to jurisdiction in South Carolina due to presence of a distributor in the forum state), *aff'd*, 349 F.2d 60 (4th Cir. 1965); Parke-Bernet Galleries, Inc. v. Franklyn, 26 N.Y.2d 13, 18-19, 256 N.E.2d 506, 509, 308 N.Y.S.2d 337, 341-42 (1970) (out-of-state individual defendant subject to jurisdiction in New York because of the presence of an art gallery employee who placed bids on behalf of the defendant at an art auction).

93. *See, e.g.*, Gelfand v. Tanner Motor Tours, Ltd., 385 F.2d 116 (2d Cir. 1967); United States v. Montreal Trust Co., 358 F.2d 239 (2d Cir.), *cert. denied*, 384 U.S. 919 (1966); Arcata Graphics Corp. v. Murrays Jewelers & Distrib., Inc., 384 F. Supp. 469 (W.D.N.Y.

tive factor in order to establish jurisdiction over a principal based on the activities of its agent. This conclusion that control is not a necessary element in the jurisdictional analysis is exemplified by a trilogy of cases decided in New York between 1965 and 1967: *Bryant v. Finnish National Airline*,[94] *Frummer v. Hilton Hotels International, Inc.*,[95] and *Gelfand v. Tanner Motor Tours, Ltd.*[96]

In *Bryant v. Finnish National Airline*,[97] the highest court in New York found that the foreign[98] airline was doing business in the forum despite the fact that it did not operate its airplanes in New York. The decision was based upon the fact that the airline maintained an office in New York, employed several people in New York, and held a New York bank account and telephone listing. In emphasizing the quality of these contacts, the court concluded that the New York office performed an essential function for the foreign corporation through public relations and publicity work and, in general, generating business for the Finnish airline.[99]

The court in *Frummer v. Hilton Hotels International, Inc.*,[100] relying on *Bryant*, held that a British hotel corporation was doing business in New York based on services performed in New York by a sister-subsidiary. The court did not mention the factor of control and did not discuss the details of the intercorporate relationship between the two sister corporations. Rather, the court based its decision on the quality and nature of the in-state activities conducted for the out-of-state defendant corporation. The court did not think that the provision of services by a related corporation rather than a company branch was an important distinction. Additionally, the court did not base its decision on the fact that the two corporations were related and stated that "the fact that the two are commonly owned is significant only because it gives rise to a valid inference as to the broad scope of agency in the absence of an express agency agreement."[101]

1974); Parke-Bernet Galleries, Inc. v. Franklyn, 26 N.Y.2d 13, 256 N.E.2d 506, 308 N.Y.S.2d 337 (1970).

94. 15 N.Y.2d 426, 208 N.E.2d 439, 260 N.Y.S.2d 625 (1965).

95. 19 N.Y.2d 533, 227 N.E.2d 851, 281 N.Y.S.2d 41 (1967).

96. 385 F.2d 116 (2d Cir. 1967).

97. 15 N.Y.2d 426, 208 N.E.2d 439, 260 N.Y.S.2d 625 (1965).

98. As used in this Comment, "foreign" refers to corporations that are not organized under the laws of one of the states or territories of the United States. The term "domestic" refers to corporations that are organized under the laws of one of the states or territories of the United States.

99. *Bryant*, 15 N.Y.2d at 432, 208 N.E.2d at 441, 260 N.Y.S.2d at 629.

100. 19 N.Y.2d 533, 227 N.E.2d 851, 281 N.Y.S.2d 41 (1967).

101. *Id.* at 538, 227 N.E.2d at 854, 281 N.Y.S.2d at 45.

The *Gelfand v. Tanner Motor Tours, Ltd.*[102] case, decided six months after *Frummer*, took the prior decisions of *Bryant* and *Frummer* one step further by establishing jurisdiction over two out-of-state domestic[103] corporations based on the in-state activities of their independent contractor. The court did not discuss the details of the relationship between the defendants and the independent contractor, and disregarded as irrelevant the total lack of control that the defendants had over the contractor.[104] Based on the agency theory set out in *Frummer*, the court held that the independent contractor acted as an agent for the out-of-state corporations. The court established this "jurisdictional agency" relationship by looking at the quality and nature of the in-state activities conducted on behalf of the out-of-state defendants rather than looking to the formal rules of agency.

The court applied the same analysis in all three cases despite the fact that each involved a different type of relationship between the in-state and out-of-state corporations. Three important conclusions can be drawn from this group of cases. First, the quality and nature of the in-state contacts made on behalf of the out-of-state corporation should be the court's primary concern. Second, control is not a determinative factor in a jurisdictional analysis. Third, the means through which business is performed—employee, subsidiary, or independent contractor—is also not a determinative factor in a jurisdictional analysis.

The wisdom to be gained from this trilogy of cases has fallen, for the most part, upon deaf ears.[105] A case exemplifying this is *Top Form Mills, Inc. v. Sociedad Nationale Industria Applicazioni Viscosa.*[106] *Top Form Mills* deals with two different jurisdictional fact situations: one between a foreign parent corporation and its in-state subsidiary, and the other between a foreign principal and its in-state agent. The plaintiff brought an action against a manufacturer and a freight forwarding company for the allegedly defective shipment of twenty-three tons of Italian knit fabric. In finding that the foreign manufacturer had a wholly-owned subsidiary admittedly doing business in New York, the court stated that the parent-subsidiary rela-

102. 385 F.2d 116 (2d Cir. 1967).

103. *See supra* note 98.

104. *Gelfand*, 385 F.2d at 119.

105. *See, e.g.*, Andrulonis v. United States, 526 F. Supp. 183 (N.D.N.Y. 1981); Top Form Mills, Inc. v. Sociedad Nationale Industria Applicazioni Viscosa, 428 F. Supp. 1237 (S.D.N.Y. 1977); Baird v. Day & Zimmerman, Inc., 390 F. Supp. 883 (S.D.N.Y. 1974); Delagi v. Volkswagenwerk AG, 29 N.Y.2d 426, 278 N.E.2d 895, 328 N.Y.S.2d 653 (1972).

106. 428 F. Supp. 1237 (S.D.N.Y. 1977).

tionship necessitated "a close factual scrutiny" of the nature of the business done by the subsidiary on behalf of its parent, as well as of the intercorporate connections and dealings between the two corporations.[107] In deciding the issue involving the principal and its agent, however, the court limited its analysis solely to the contacts made by the in-state agent on behalf of the foreign principal.[108] In both fact situations, the court held that the out-of-state defendant was amenable to jurisdiction in New York on the basis of an agency theory. In so doing, the court applied the same "theory" to both jurisdictional issues but a different "analysis" to each.

The *Frummer*, *Gelfand*, and *Top Form Mills* cases, as well as the comparison between cases that apply the agency theory to parent-subsidiary situations and those that apply it to other types of situations, illustrate an important point. The term "agent" as used in the jurisdictional sense does not indicate a particular method of analysis and standard of proof, but is merely a term that courts have used indiscriminately to justify exercising personal jurisdiction over an out-of-state corporation.

C. Alternative Application of the Cannon Rule and the Minimum Contacts Test: Stream of Commerce Theory

The Supreme Court decision in *World-Wide Volkswagen Corp. v. Woodson*[109] caused many courts to finally realize that the means through which business is conducted is irrelevant for jurisdictional purposes.[110] Although the jurisdictional issue in *World-Wide Volk-*

107. *Id.* at 1242.

108. *Id.* at 1246.

109. 444 U.S. 286 (1980).

110. *See, e.g.*, Allen Organ Co. v. Kawai Musical Instruments Manufacturing Co., 593 F. Supp. 107, 112 (E.D. Pa. 1984) ("[T]he fairness requirements of due process do not extend so far as to permit a manufacturer to insulate itself from the reach of the forum state's long-arm rule by using an intermediary or by professing ignorance of the ultimate destination of its products." (quoting DeJames v. Magnificence Carriers, Inc., 654 F.2d 280, 285 (3d Cir. 1981))); Copiers Typewriters Calculators, Inc. v. Toshiba Corp., 576 F. Supp. 312, 320 (D. Md. 1983) ("Due Process does not require that the contacts the [foreign] manufacturer has with the forum state be directly created and maintained by the manufacturer . . . ."); Lasky v. Continental Products Corp., 569 F. Supp. 1225, 1227 (E.D. Pa. 1983) ("The fact that Nissan conducts its marketing and distribution in the United States through an independent distribution system does not shield it from the imposition of *in personam* jurisdiction in Pennsylvania."); United States v. Toyota Motor Corp., 561 F. Supp. 354, 359 (C.D. Cal. 1983) ("Recent decisions . . . emphasize that purposeful exploitation of the forum's market rather than the means through which this is carried out is the relevant fact."); Graco, Inc. v. Kremlin, Inc., 558 F. Supp. 188, 193 (N.D. Ill. 1982) ("Because SKM receives substantial economic benefit from its regular activity within the state, it can be said to be 'doing business' here even though its dealings here are indirect.").

swagen did not involve related corporations,[111] the "stream of commerce" dicta in the opinion has been readily applied by courts to the jurisdictional situation involving related corporations.[112] The Court in *World-Wide Volkswagen* stated that "a forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the stream of commerce with the expectation that they will be purchased by consumers in the forum State."[113] This is true regardless of whether the out-of-state corporation "directly or indirectly" delivers its products into the market of the forum state.[114] The stream of commerce theory that evolved from *World-Wide Volkswagen* is a particularized version of the minimum contacts theory because courts apply the rationale only in cases involving a manufacturer whose goods are somehow distributed to jurisdictions other than the jurisdiction in which the goods are manufactured.

In *Graco, Inc. v. Kremlin, Inc.*,[115] the court evaluated the jurisdictional issue as it related to both the *Cannon* rule and the stream of commerce theory. The plaintiff in *Graco* brought a patent infringement[116] suit against an out-of-state manufacturer and its in-state wholly-owned subsidiary. The parent corporation manufactured paint spraying equipment. Its subsidiary was the sole source of distribution of its products into the United States market. The court first analyzed whether jurisdiction could be acquired over the parent corporation under the *Cannon* rule. After briefly considering several factors,[117] the court concluded that the subsidiary acted as an inde-

111. *World-Wide Volkswagen*, 444 U.S. at 289. The jurisdictional issue in *World-Wide Volkswagen* involved a regional distributor, World-Wide Volkswagen Corporation (World-Wide), and a retail dealer, Seaway. World-Wide and Seaway were fully independent corporations whose relations with each other, as well as with the automobile's manufacturer and importer, were only contractual.

112. *See, e.g.*, Allen Organ Co. v. Kawai Musical Instruments Manufacturing Co., 593 F. Supp. 107 (E.D. Pa. 1984); Copiers Typewriters Calculators, Inc. v. Toshiba Corp., 576 F. Supp. 312 (D. Md. 1983); Lasky v. Continental Products Corp., 569 F. Supp. 1225 (E.D. Pa. 1983); United States v. Toyota Motor Corp., 561 F. Supp. 354 (C.D. Cal. 1983); Coons v. Honda Motor Co., 176 N.J. Super. 575, 424 A.2d 446 (App. Div. 1980).

113. *World-Wide Volkswagen*, 444 U.S. at 297-98.

114. *Id.* at 297.

115. 558 F. Supp. 188 (N.D. Ill. 1982).

116. The applicability of the stream of commerce doctrine is not limited to products liability cases. The stream of commerce theory can be applied in any type of action involving a parent/manufacturer and subsidiary/distributor. *See, e.g.*, Allen Organ Co. v. Kawai Musical Instruments Manufacturing Co., 593 F. Supp. 107 (E.D. Pa. 1984) (stream of commerce theory applied in a patent-infringement action); Copiers Typewriters Calculators, Inc. v. Toshiba Corp., 576 F. Supp. 312 (D. Md. 1983) (stream of commerce theory applied in a breach of contract action); United States v. Toyota Motor Corp., 561 F. Supp. 354 (C.D. Cal. 1983) (stream of commerce theory applied in an action to enforce two IRS summonses).

117. *Graco*, 558 F. Supp. at 191. The factors that the court analyzed in making its

pendent corporate entity and, therefore, that jurisdiction over the parent could not be based on the parent-subsidiary relationship.

Realizing that the *Cannon* rule had often been criticized, the court in *Graco* alternatively analyzed whether jurisdiction over the foreign parent could be asserted under the stream of commerce theory. In doing so, the court emphasized the substantial economic benefit derived by the out-of-state parent corporation through the sale of its equipment to the in-state subsidiary. Dismissing as inconsequential the fact that the parent's contacts were only indirect,[118] the court concluded that the parent was in fact doing business and, therefore, had minimum contacts with the forum state.

Unfortunately, some courts have not applied this stream of commerce theory of jurisdiction and have continued to go into the unnecessary and detailed analysis of the intercorporate family relationship between the parent and its subsidiary.[119] For example, the court in *Bulova Watch Co. v. K. Hattori & Co.*[120] applied an agency-like theory, better known as a complicated enterprise theory,[121] to decide if the out-of-state foreign corporation was amendable to suit in the forum state. At the end of a lengthy opinion[122] that analyzed in great detail the intercorporate relationship between the parent/manufacturer and its subsidiary/distributor, the court concluded that the essential element in such a case is the benefit that the out-of-state foreign parent receives from the activities conducted by its in-state subsidiary.[123]

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determination that the subsidiary acted as an independent corporate entity are whether the parent arranges financing for and capitalization of the subsidiary; whether separate books, tax returns, and financial statements are kept; whether officers or directors are the same; whether the parent holds its subsidiary out as an agent; the method of payment made to the parent by the subsidiary; and how much control is exerted by the parent over the daily affairs of its subsidiary. *Id.*

118. *Id.* at 193. The means through which the forum's market was served, direct or indirect, is not a relevant factor in a jurisdictional analysis. What is relevant is whether the defendant intended to serve the forum's market.

119. *See, e.g.*, Andrulonis v. United States, 526 F. Supp. 183 (N.D.N.Y. 1981); Bulova Watch Co. v. K. Hattori & Co., 508 F. Supp. 1322 (E.D.N.Y. 1981); Cascade Steel Rolling Mills, Inc. v. C. Itoh and Co. (America) Inc., 499 F. Supp. 829 (D. Or. 1980).

120. 508 F. Supp. 1322 (E.D.N.Y. 1981).

121. Brilmayer & Paisley, *supra* note 71, at 30.

122. *Compare* Bulova Watch Co. v. K. Hattori & Co., 508 F. Supp. 1322 (E.D.N.Y. 1981) (in a twenty-five page opinion, the court disposed of the personal jurisdiction issue by applying an agency-like theory) *with* Lasky v. Continental Products Corp., 569 F. Supp. 1225 (E.D. Pa. 1983) (in a one-page opinion, the court disposed of the personal jurisdiction issue by applying the stream of commerce doctrine).

123. *Bulova Watch*, 508 F. Supp. at 1344-45.

D. Shortcomings of the Various Jurisdictional Theories

The alter ego, agency, and stream of commerce theories all fall short of offering an effective method for determining when the contacts of an in-state corporation can be attributed to a related out-of-state corporation for personal jurisdiction purposes. The alter ego and agency theories fail because they do not directly address the crux of the issue: whether the defendant purposefully established minimum contacts in the forum state. Because they are conceptual theories stemming from substantive rules of liability, they emphasize the relationship between the related corporations rather than the in-state contacts made on behalf of the out-of-state party. They dispose of the jurisdictional issue via a circuitous route requiring unnecessary analysis into irrelevant aspects of the relationship between the related corporations, which is a waste of time for the court as well as the litigants.

The stream of commerce theory is ineffective because, conceptually, its applicability is limited to acquiring jurisdiction over a parent/manufacturer through the activities of its subsidiary/distributor. The jurisdictional issue involving related corporations is not, however, limited to the manufacturer-distributor fact situation. A subsidiary can be employed to extend the parent's product line,[124] to extend the parent's business into another geographic location,[125] and to provide services for the parent, a sister-subsidiary,[126] or both.[127] Additionally, a subsidiary can function as an investment for the parent corporation.[128]

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124. *See, e.g.*, Rollins v. Proctor & Schwartz, 478 F. Supp. 1137 (D.S.C. 1979); DCA Food Industries Inc. v. Hawthorn Melody, Inc., 470 F. Supp. 574 (S.D.N.Y. 1979); Orefice v. Laurelview Convalescent Center, Inc., 66 F.R.D. 136 (E.D. Pa. 1975).

125. *See, e.g.*, Saraceno v. S.C. Johnson and Son, Inc., 83 F.R.D. 65 (S.D.N.Y. 1979); Rea v. An-Son Corp., 79 F.R.D. 25 (W.D. Okla. 1978); Titu-Serban Ionescu v. E.F. Hutton & Co. (France) S.A., 434 F. Supp. 80 (S.D.N.Y. 1977); Botwinick v. Credit Exchange, Inc., 419 Pa. 65, 213 A.2d 349 (1965).

126. *See, e.g.*, Gavigan v. Walt Disney World, Inc., 646 F. Supp. 786 (E.D. Pa. 1986); Arrow Trading Co. v. Sanyei Corp. (Hong Kong), 576 F. Supp. 67 (S.D.N.Y. 1983).

127. *See, e.g.*, Frummer v. Hilton Hotels Int'l, Inc., 19 N.Y.2d 533, 227 N.E.2d 851, 281 N.Y.S.2d 41 (1967).

128. *See, e.g.*, McPheron v. Penn Central Transportation Co., 390 F. Supp. 943 (D. Conn. 1975); *cf.* Bellomo v. Pennsylvania Life Co., 488 F. Supp. 744 (S.D.N.Y. 1980) (case offers a method for determining whether a parent holding company owns its subsidiaries for investment purposes or whether the parent holding company is actually "doing business" through its subsidiaries).

IV. Proposal

A. Determination of the Essential Criteria for Attribution

It is clear from the cases analyzed in the preceding section that in certain situations it is appropriate to attribute the activities of an in-state corporation to a related out-of-state corporation. The problem, however, is pin-pointing those elements or factors that are essential for such attribution.

1. Stream of Commerce Cases.—In analyzing cases that apply the stream of commerce theory, both those that deal with related corporations[129] and those that do not,[130] the determinative factor appears to be the *intent* of the out-of-state defendant corporation. In *United States v. Toyota Motor Corp.*,[131] the court recognized that purposeful availment of the forum's market was the relevant factor and stated that "the fact that Toyota Japan's products reach the United States through a wholly-owned subsidiary, rather than directly from the parent corporation, is inconsequential for due process purposes. Instead, due process is satisfied so long as Toyota Japan knew and *intended* that its vehicles would be sold here . . . ."[132] Another case involving a parent and subsidiary corporation concluded that

> Due Process does not require that the contacts the [foreign] manufacturer has with the forum state be directly created and maintained by the manufacturer, if the manufacturer indirectly, but *intentionally*, introduces the goods into a market that includes the forum state, since the contacts then are not merely fortuitous, but are *intended*.[133]

Courts applying the stream of commerce theory of jurisdiction have interpreted this intent requirement as stemming from the word

129. *See, e.g.*, Allen Organ Co. v. Kawai Musical Instruments Manufacturing Co., 593 F. Supp. 107 (E.D. Pa. 1984); Copiers Typewriters Calculators, Inc. v. Toshiba Corp., 576 F. Supp. 312 (D. Md. 1983); Lasky v. Continental Products Corp., 569 F. Supp. 1225 (E.D. Pa. 1983); United States v. Toyota Motor Corp., 561 F. Supp. 354 (C.D. Cal. 1983).

130. *See, e.g.*, Nelson v. Park Industries, Inc., 717 F.2d 1120 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 1278 (1984); Hedrick v. Daiko Shoji Co., Ltd., Osaka, 715 F.2d 1355 (9th Cir. 1983); Noel v. S.S. Kresge Co., 669 F.2d 1150 (6th Cir. 1982); Stabilisierungsfonds Fur Wein v. Kaiser Stuhl Wine Distributors Pty. Ltd., 647 F.2d 200 (D.C. Cir. 1981); Oswalt v. Scripto, Inc., 616 F.2d 191 (5th Cir. 1980); Rockwell International Corp. v. Costruzoioni Aeronautiche Giovanni Agusta, 553 F. Supp. 328 (E.D. Pa. 1982).

131. 561 F. Supp. 354 (C.D. Cal. 1983).

132. *Id.* at 359 (emphasis added).

133. Copiers Typewriters Calculators, Inc. v. Toshiba Corp., 576 F. Supp. 312, 320 (D. Md. 1983) (emphasis added).

"expectation" as it was used in *World-Wide Volkswagen Corp. v. Woodson.*[134] At least two federal circuit courts have further interpreted the intent requirement to be purely objective, concluding that the distinction between "known" and "should have known" is not relevant in the jurisdictional analysis.[135] The requisite intent can be established by showing, first, that the out-of-state manufacturer knew or should have known that the stream of commerce into which it placed its goods would supply the market of the forum state and, second, that the out-of-state manufacturer accepted the benefits of the revenue derived therefrom.[136]

Because the policy behind limiting a state's adjudicatory authority is one of fairness to the defendant,[137] courts applying the stream of commerce theory have realized that a determination of what is fair turns in large part on the intent of the out-of-state manufacturer. A manufacturing corporation that is profiting from the intended sale of its products should not be allowed to insulate itself from liability simply by avoiding direct contact with the forum. The manufacturer's economic relationship with a state does not differ depending on whether it distributes its products through a company division, a subsidiary, or an independent contractor, and nor should its amenability to suit.

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134. 444 U.S. at 297-98. *See supra* text accompanying note 113.

135. Hedrick v. Daiko Shoji Co., Ltd., Osaka, 715 F.2d 1355, 1358 (9th Cir. 1983) ("A manufacturer or supplier of a defective product who knew or should have known that a product would enter the stream of commerce can be subjected, consistently with due process, to a forum state's long-arm jurisdiction and be sued in the forum where the injury occurred."); Oswalt v. Scripto, Inc., 616 F.2d 191, 200 (5th Cir. 1980) ("The ultimate test of in personam jurisdiction is 'reasonableness' and 'fairness' and 'traditional notions of fair play and substantial justice[.]' In applying such a test, it is a matter of common sense that there should be no distinction between 'known' and 'should have known.' " (citation omitted)).

136. *See, e.g.*, Nelson v. Park Industries, Inc., 717 F.2d 1120, 1125-26 (7th Cir. 1983) ("[A] manufacturer or primary distributor may be subject to a particular forum's jurisdiction when a secondary distributor and retailer are not, because the manufacturer and primary distributor have intended to serve a broader market and they derive direct benefits from serving that market."); Noel v. S.S. Kresge Co., 669 F.2d 1150, 1153 (6th Cir. 1982) ("Ohio exercises personal jurisdiction over foreign sellers of goods even though there have been no direct sales in Ohio so long as the seller receives a substantial amount of revenue from goods used in Ohio and the seller might reasonably have expected the goods to be used there."); Copiers Typewriters Calculators, Inc. v. Toshiba Corp., 576 F. Supp. 312, 319-20 (D. Md. 1983) ("By its efforts to serve the United States market, by placing its goods in the stream of commerce which will supply that market, and by welcoming the sales and the revenue derived therefrom, Toshiba evidences its intent that its goods reach the states of the United States, in which its goods are sold.").

137. Burger King Corp. v. Rudzewicz, 105 S. Ct. 2174, 2181-82, 2182 n.13 (1985). In *Burger King*, the Supreme Court stated that the restraints imposed on a state's adjudicatory authority " 'must be seen as ultimately a function of the individual liberty interest preserved by the Due Process Clause' rather than as a function of 'federalism concerns.' " *Id.* at 2182 n.13 (quoting Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee, 456 U.S. 694, 702 n.10 (1982)).

2. Burger King Case.—In *Burger King Corp. v. Rudzewicz*,[138] the Supreme Court reaffirmed that the out-of-state defendant's *intent* is a critical factor in determining whether the assertion of jurisdiction over the defendant would be reasonable. The Court stated,

> [W]here the defendant "deliberately" has engaged in significant activities within a State, or has created "continuing obligations" between himself and residents of the forum, he manifestly has availed himself of the privilege of conducting business there, and because his activities are shielded by "the benefits and protections" of the forum's laws it is presumptively not unreasonable to require him to submit to the burdens of litigation in that forum as well.[139]

The jurisdictional issue in *Burger King* involved a contractual relationship between a franchisor and a franchisee. The franchisor, Burger King Corporation, sued the franchisee, Rudzewicz, in the franchisor's forum state for breach of franchise obligations and trademark infringement. The Court stated that a contract with an out-of-state party cannot alone establish minimum contacts in the other party's home forum. Instead, the Court emphasized a "realistic approach" whereby a court would look within, as well as without, the contract to ascertain whether the defendant had sufficient contacts in the forum state.[140] After analyzing the prior negotiations between the parties, the contemplated future consequences of the contractual relationship, the terms of the contract, and the actual course of dealing between the parties,[141] the Court concluded that the exercise of jurisdiction was "presumptively reasonable."[142] The Court found that "Rudzewicz deliberately reached out beyond Michigan and negotiated with a Florida corporation for the purchase of a long-term franchise and the manifold benefits that would derive from affiliation with a nationwide organization."[143] Consequently, Rudzewicz's contacts were of a quality and nature such that he

138. *Id.*
139. *Id.* at 2184 (citations omitted).
140. *Id.* at 2185.
141. *Id.* at 2186.
142. *Id.* Jurisdiction can only be "presumptively" reasonable prior to the consideration of the in-state contacts in light of other relevant factors in order to determine whether the exercise of personal jurisdiction would comport with traditional notions of fair play and substantial justice. Such relevant factors include the burden on the defendant, the forum state's interest in adjudicating the dispute, the plaintiff's interest in adjudicating the dispute, the plaintiff's interest in obtaining convenient and effective relief, the interstate judicial system's interest in obtaining the most efficient resolution of controversies, and the shared interest of the several states in furthering fundamental substantive social policies. *Id.* at 2184.
143. *Id.* at 2186.

should have reasonably anticipated being haled into court in Florida.

A parent-subsidiary relationship is not unlike that of a franchisor-franchisee relationship. The contract that bound the two unrelated corporations in *Burger King* can be analogized to the stock that binds two separate but related corporations. Conceptually, the contract can be viewed as a marriage certificate[144] and the stock as a birth certificate.[145] The contract creates a voluntary relationship analogous to husband and wife, and the stock creates a more subservient relationship analogous to parent and child. Both certificates, however, create a substantive legal relationship between the two corporations. The primary difference between the two certificates is that the stock certificate confers rights of ownership, including limited liability, on the holder; whereas the contract does not confer any such rights of ownership.

Because of these conceptual similarities between the franchisor-franchisee and parent-subsidiary relationships, it is reasonable to suggest that, if the Supreme Court were to address a jurisdictional issue involving a parent-subsidiary relationship, it would apply the *Burger King* analysis.[146] The Court would most likely reason that the stock alone was not sufficient to establish minimum contacts with the related corporation's forum. Recognizing that the stock, similar to the contract, was only an indication that contacts exist between two corporations, the Court would look beyond the stock to determine whether the contacts were of a sufficient quality and nature that the assertion of jurisdiction would be "presumptively reasonable."[147]

The Court would then analyze the business dealings between the parent and subsidiary, treating them as two separate and unrelated entities without reference to their family ties. In other words, the analysis would be limited to the business and commercial dealings between the parent and child and would not delve into their family matters.[148] The business dealings would be evaluated to deter-

144. In *Burger King*, the Court referred to the litigation arising from Burger King's termination of the franchise as "a divorce proceeding among commercial partners." *Id.* at 2179.

145. In order for a corporation to come into existence and continue to exist as such, the corporation must issue shares of stock.

146. This suggestion is made with the assumption that the out-of-state corporation over which jurisdiction is sought is sued for its own activities. *See supra* notes 20-24 and accompanying text.

147. *Burger King*, 105 S. Ct. at 2186. The assertion of jurisdiction cannot definitely be deemed reasonable until a court concludes, through the second step of the due process analysis, that it would comport with traditional notions of fair play and substantial justice. *See supra* note 142.

148. For some examples of what constitutes "family matters," see footnotes 77 and 117.

mine which activities the in-state corporation did or continued to do on behalf of the business enterprise of the out-of-state corporation. If the Court determined that the in-state activities were done with the knowledge of the out-of-state corporation and that the out-of-state corporation derived a substantial benefit from those activities,[149] the Court would conclude that the out-of-state corporation was "presumptively" amenable to suit in the forum state.

B. Jurisdictional Rule of Attribution

In evaluating the out-of-state defendant's contacts with the forum, the Court in *Burger King* stated that Rudzewicz's cofranchisee's trip to Florida to satisfy the Burger King training requirements could be attributed to Rudzewicz for the purpose of establishing jurisdiction.[150] The Court explained that "when commercial activities are 'carried on in behalf of' an out-of-state party those activities may sometimes be ascribed to the party, . . . at least where he is a 'primary participan[t]' in the enterprise and has acted purposefully in directly those activities."[151] The Court cited *International Shoe Co. v. Washington*[152] as the authority for this idea of attribution. In *International Shoe*, the Court upheld the forum state's exercise of jurisdiction based on the attribution of the in-state activities of salesmen to the out-of-state defendant corporation on whose behalf the activities were conducted.[153]

Based on these criteria for attribution,[154] it appears that attribution could have been applied in *Burger King* in a broader sense. The Court described Rudzewicz's contact with the forum state in terms of a voluntary relationship "that envisioned continuing and wide-reaching contacts with Burger King in Florida."[155] Alternatively, the Court could have expressed the same idea by stating that all the activities that Burger King had done on behalf of Rudzewicz, as well

149. *See supra* note 136 and accompanying text.
150. *Burger King*, 105 S. Ct. at 2186 n.22.
151. *Id.*
152. 326 U.S. 310 (1945).
153. *Id.* at 320. The idea of attribution as applied in *International Shoe* was expanded in *Burger King*. In *International Shoe*, the salesmen whose activities were ascribed to the out-of-state corporation were employees of that corporation. In *Burger King*, the Court ascribed MacShara's forum state activities to Rudzewicz although MacShara and Rudzewicz had neither formed a partnership nor a corporation at the time of those activities. In exalting substance over form, the Court in *Burger King* attributed the activities of the in-state party to the out-of-state party regardless of the label, or lack thereof, under which their relationship existed.
154. *Burger King*, 105 S. Ct. at 2186 n.22. *See infra* text accompanying notes 164-65.
155. *Burger King*, 105 S. Ct. at 2186.

as those it had contemplated doing pursuant to the contract, would be attributed to Rudzewicz for the purpose of establishing minimum contacts. Arguably, there is no real difference between stating Rudzewicz's contact with the forum in terms of a "continuing relationship" and stating it in terms of "attribution." The benefit of phrasing the basis of jurisdiction in terms of attribution, however, is that the idea of attribution is applicable to all types of fact situations.[156] On the other hand, the applicability of the phrase "continuing relationship," like "stream of commerce,"[157] is limited to specific fact situations.

Justice Frankfurter articulated this idea of jurisdictional attribution as applied to corporations very appropriately in his concurring opinion in *United States v. Scophony Corp.*[158] Frankfurter stated that "a corporation as such never transacts business and is never found anywhere, but does 'transact business' and is 'found' somewhere by attribution to the corporation of what human beings do for it."[159] Because the corporate person is in reality only a fiction, "but a fiction to be acted upon as though it were fact,"[160] it has no physical presence. In the jurisdictional sense, a corporate person is present, or has minimum contacts, wherever it transacts business.[161] A corporate person can transact business, however, only vicariously through natural persons.[162] The label attached to those natural persons determines the degree of control that the corporate person has over those natural persons, as well as the rights and duties that exist between the corporate person, the natural persons, and third parties.[163] The label, however, does not affect the end result—the transaction of business on behalf of the corporate person. Consequently, the label attached to those natural persons—agent, employee, independent contractor, or related corporation—through which a corporation

156. The discussion of attribution as a theory of jurisdiction is, however, limited to the scope of this Comment.

157. The stream of commerce theory can also be expressed more generally in terms of attribution. For example, it could be stated that every sale of the manufacturer's product made on behalf of the manufacturer by an in-state entity would be attributed to the out-of-state manufacturer for the purpose of establishing minimum contacts.

158. 333 U.S. 795 (1948). In granting jurisdiction over a British corporation based upon the local operations of its American subsidiary, the Court in *Scophony* adopted an "economic reality" theory based on the practical and broader business conception of engaging in any substantial business operation.

159. *Id.* at 820 (Frankfurter, J., concurring).

160. *International Shoe*, 326 U.S. at 316 (citing Klein v. Board of Supervisors, 282 U.S. 19, 24 (1930)).

161. *Id.* at 316.

162. *Id.* at 316-17.

163. *See generally* RESTATEMENT (SECOND) OF AGENCY (1957).

chooses to do business should not be a relevant factor in the determination of whether an out-of-state corporation has minimum contacts in the forum state.

The benefit of a jurisdictional theory of attribution as it applies to related corporations, other than its widespread applicability, is that it recognizes no distinction between related and unrelated corporations and focuses the court's attention on the intent of the out-of-state corporate defendant. To attribute the in-state activities of a corporation to a related out-of-state corporation, there are two essential criteria.[164] First, the in-state corporation must carry on commercial activity on behalf of the out-of-state corporation. Second, the out-of-state corporation must purposefully avail itself of those in-state activities. This purposeful availment or intent requirement can be further broken down into two sub-elements.[165] The out-of-state corporation must know that the in-state activities are being done on its behalf *and* the out-of-state corporation must accept the benefits derived from those in-state activities.

A rule of attribution, as proposed in this Comment, is not a "clear-cut jurisdictional rule."[166] Rather, it is a general rule of thumb for determining when the in-state activities of one corporation may be attributed to an out-of-state corporation, related or unrelated, for the purpose of establishing that the out-of-state corporation has minimum contacts in the forum state. It is a "rule" that is not conclusory, but one that turns upon the individual facts of each case.[167] Additionally, a rule of attribution is only applied at the first step of the jurisdictional due process analysis. The determination, through the application of the rule of attribution, that the out-of-state corporation has minimum contacts with the forum state is only the initial inquiry. The second step of the due process analysis requires the consideration of many other factors[168] before jurisdiction can be found to comport with "traditional notions of fair play and substantial justice."[169]

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164. Although the Supreme Court in *Burger King* did not "resolve the permissible bounds of such attribution," it would not be unreasonable to propose a jurisdictional rule of attribution based on those criteria set forth by the Court in footnote twenty-two. *See Burger King*, 105 S. Ct. at 2186 n.22.

165. *See supra* note 136 and accompanying text.

166. *See Burger King*, 105 S. Ct. at 2189 n.29. *See also International Shoe*, 326 U.S. at 319.

167. " '[T]he facts of each case must [always] be weighed' in determining whether personal jurisdiction would comport with 'fair play and substantial justice.' " *Burger King*, 105 S. Ct. at 2189 (citing Kulko v. California Superior Court, 436 U.S. 84, 92 (1978)).

168. *See supra* note 142.

169. *International Shoe*, 326 U.S. at 316.

V. Conclusion

Within the last three decades, the number of corporations that have chosen to form a parent-subsidiary structure has increased significantly.[170] The motives behind this corporate family formation are grounded in part on legal and economic considerations unique to each business sector.[171] For example, in regulated businesses such as banking and insurance, an independent corporation will turn itself into a subsidiary and create its own parent.[172] This structure is desirable because it allows diversification into nonregulated businesses and lessens the grip of the respective regulatory agency and law.[173] For jurisdictional purposes, however, these motives and the resulting corporate structure are not and should not be of concern to a court. A structure that a corporation has voluntarily chosen for itself should not stand in the way of a court exercising its adjudicatory authority when it is otherwise fair and reasonable to do so.

This recent corporate trend towards subsidiaries, as well as the increased nationalization and internationalization of commerce, make it apparent that jurisdictional issues involving related corporations will occur even more frequently in the future. It is important, therefore, for courts to effectively and efficiently dispose of these procedural issues. When a court is faced with a jurisdictional issue involving related corporations, it should first determine why jurisdiction is sought. If jurisdiction is sought over an out-of-state parent in an attempt to hold the parent liable for the acts of its in-state subsidiary, a court has a rational reason for applying an analysis that forces the jurisdictional issue to anticipate the merits.[174] The alter ego and agency theories previously discussed provide such an analysis. Otherwise, a court should analyze the issue on the same minimum contacts basis employed in other personal jurisdiction cases.

Once it has been determined that the out-of-state defendant is being sued for its own acts, a court should disregard the family relationship between the two corporations and, instead, focus on their business and commercial dealings. If, in analyzing this business relationship, it can be shown that the out-of-state corporation intended to transact business in the forum state through a related in-state cor-

170. M. EISENBERG, THE STRUCTURE OF THE CORPORATION—A LEGAL ANALYSIS 277 (1976).

171. *Id.* at 280.

172. *Id.*

173. *Id.*

174. *See supra* notes 20-24 and accompanying text.

poration,[175] then the out-of-state corporation will be "present" in the state through attribution. The constitutional touchstone is "whether the defendant purposefully established 'minimum contacts' in the forum state."[176] Consequently, the means through which an out-of-state corporation establishes its in-state contacts—either through an agent, an employee, an independent contractor, or a related corporation—is *not* relevant for personal jurisdiction purposes.

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175. *See supra* note 136 and accompanying text.
176. Burger King Corp. v. Rudzewicz, 105 S. Ct. 2174, 2183 (1985).